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IN THE

Supreme Court of the United States

October Term, 1962.

No. 1028

BRONNE A. BRUZGO, JR., and ROBERT J. BRUZGO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Charles Bidelspacher, on behalf of the Petitioners, Bronne A. Bruzgo, Jr. and Robert J. Bruzgo, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on March 20, 1963.

OPINIONS BELOW.

The opinion and orders of January 8, 1963 of the District Court for the Middle District of Pennsylvania have not been reported. Copies are appended as Appendix I.

The opinions of the Circuit Court of Appeals for the Third Circuit have not been reported. Copies are appended as Appendix II and Appendix III.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was made and entered on March 20, 1963, and copies thereof are appended to this petition in the Appendix at pp. 27, 28. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

The Fifth Amendment to the Constitution of the United States mandates that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. This amendment was flagrantly violated by two Federal Prosecutors moving the Grand Jury by passion and prejudice so that the Petitioners never had the benefit of an unbiased and unprejudiced Grand Jury proceeding as contemplated by the Fifth Amendment to the Constitution of the United States. These two Federal Prosecutors were willing to, and did, threaten a close business associate of the Petitioners with deportation, loss of her Naturalized Citizenship, a $10,000.00 fine and five years in prison. These same Federal Prosecutors prejudiced the Grand Jury by telling the Grand Jurors falsely that the Petitioners herein associated with thieves and racketeers, all of which conduct moved the Grand Jurors to the extreme that they were "hissing" the close business associate of the Petitioners. All of the foregoing conduct moved the Grand Jury to indict the Petitioners herein through passion and prejudice when said Grand Jury should have been calmly and deliberately performing the functions of the Grand Jury as mandated by the Fifth Amendment to the Constitution of the United States. The District Court ignored this conduct on the part of the Federal Prosecuting Attorneys by

calling it "immaterial". The Court of Appeals refused to take jurisdiction. The Questions presented are:

1. Were the Grand Jury Proceedings in this case so permeated by passion and prejudice as to not be valid Grand Jury Proceedings as contemplated by Common Law and the Fifth Amendment to the Constitution of the United States?

2. Did the District Court err in holding that it was "immaterial" that two Federal Prosecutors dominated and controlled the Grand Jury by Passion and Prejudice and did the District Court err in holding such Grand Jury Proceedings were valid?

3. Did the Circuit Court of Appeals err in holding that it lacked jurisdiction to review the District Court's Decision?

CONSTITUTIONAL AMENDMENT INVOLVED.

The Fifth Amendment to the Constitution of the United States is herein involved. Said Amendment is as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT.

On March 8, 9 and 10, 1961, Miss Florence Williams, an elderly spinster and close business associate of the Petitioners, was called to testify before a Grand Jury, sitting in the Middle District of Pennsylvania, to investigate the income tax returns of the petitioners. Upon her appearance before the Federal Grand Jury, the two Federal Prosecutors prejudiced the Grand Jury against the Petitioners by telling the jurors falsely that the Petitioners associated with thieves and racketeers and that the witness, Miss Florence Williams, whom the Prosecutors had summoned, was a "thief" and a "racketeer" all of which was false. These Federal Prosecutors further degraded Petitioners in the eyes of the Jurors by stating that Petitioners employed other than native born as bookkeepers and further degraded Petitioners by threatening their associate before the Grand Jurors with loss of her Naturalized United States Citizenship and by threatening her with five years' imprisonment and by threatening her with a $10,000.00 fine. These Federal Prosecutors embarked upon a course of conduct in these cases far beyond all permissible bounds which they calculated would, and which in fact did, move this Grand Jury by passion and prejudice and this procured "indictments" from a biased, prejudiced and tainted Grand Jury.

The following is the uncontroverted Affidavit of an eye witness to this conduct of these Federal Prosecutors showing how these Federal Prosecutors besmirched the Petitioners before the Grand Jury in direct contravention of the Constitutional Guarantee that the Petitioners have a fair and impartial Grand Jury Proceeding. Here is the Affidavit:

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA
v.
BRONNE A. BRUZGO., JR.,
ROBERT J. BRUZGO.

Nos. 13577 CRIMINAL
13633 CRIMINAL

AFFIDAVIT PURSUANT TO ORDERS OF COURT DATED JANUARY 31, 1962, AND FEBRUARY 7, 1962.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CARBON } *ss.:*

Personally appeared before me a Notary Public in and for the above set forth County and State, Florence Williams who, being by me duly sworn according to law did depose and say that she was subpoenaed by the then U. S. Attorney Daniel Jenkins to appear before the Grand Jury which returned the above captioned Indictments and that said Indictments were procured by threatening Florence Williams, witness before this Grand Jury, with loss of her United States Citizenship, with five years imprisonment, with a $10,000.00 fine and by describing this witness in front of said Grand Jury as a "thief" and a "racketeer" and a business associate of the Defendants, all of which conduct by the then U. S. Attorney Daniel Jenkins and his Assistant William Morgan then before this Grand Jury on March 8, 9 and 10, 1961, was calculated to, and did move this Grand Jury by passion and prejudice to the

extreme that the Grand Jury was "hissing" at and in the presence of the witness Florence Williams.

/s/ FLORENCE WILLIAMS.
Florence Williams.

Sworn to and subscribed before me this 27th day of February, 1962.

/s/ ROBERT HOLLAR,
Notary Public.

Miss Florence Williams, the above affiant, has given a consistent and straightforward account of how the Grand Jury in these cases was swayed to indict by passion and prejudice deliberately caused by the two named Federal Prosecutors. She so informed her Counsel on March 8 and again on March 9, 1961. This was her same position in open Court before the Honorable John W. Murphy, Chief United States District Judge on March 10, 1961, when she was cited for contempt by these same Federal Prosecutors. Judge Murphy dismissed the contempt action against Miss Williams ruling that "the Government hasn't shown any reason for any contempt" and because of that ruling he decided there was no necessity for inquiring into the conduct of the Federal Prosecutors although Judge Murphy admonished "it may be that would become pertinent if ever there is a case here;". *Transcript hearing of March 10, 1961, In the Matter of Grand Jury Witness Florence Williams, pages 22 and 23.*

These two Federal Prosecutors have never denied their improper conduct with this Grand Jury in these cases. They were confronted with their improper conduct by direct confrontation in open Court on March 10, 1961, before the Honorable John W. Murphy, then Chief United States District Judge. *Transcript hearing of March 10, 1961, In the Matter of Grand Jury Witness Florence Williams, page 20.* They had ample time to think this confrontation over —Judge Murphy gave them the entire noon recess and the afternoon session of Court but they never denied these charges.

This is important because as the Court said in *United States v. Wells*, 163 Fed. 313, at page 322, "these views are fortified by the failure of the district attorney to take the stand to explain or dispute the conduct attributed to him . . . and the absence of the district attorney as a witness, or, if taken by the reporter, the failure to reproduce the remarks made by him, justify the inference that he could not have denied the strongest statement which any juror made." In the *Wells* case the Court quashed the indictments because of the improper conduct of the Prosecuting Attorney before the Grand Jury.

From the time that the above set forth Affidavit of Miss Florence Williams was filed pursuant to Court Order, there has never been any answering affidavit by the named Federal Prosecutor Jenkins denying the truth of Miss Williams' Affidavit.

From the time that the above set forth Affidavit of Miss Florence Williams was filed pursuant to Court Order, there has never been any answering affidavit by the named Federal Prosecutor Morgan denying the truth of Miss Williams' Affidavit.

The Government has never filed any affidavit denying the truth of the above set forth Affidavit of Miss Florence Williams.

The Government has produced no evidence denying the truth of the above set forth Affidavit of Miss Florence Williams.

Despite all this, the Lower Court Judge in his appealed from decision and Orders of January 8, 1963, has ruled that the conduct of the two Federal Prosecutors and their calculated effects upon this Grand Jury and the influencing of this Grand Jury by passion and prejudice to the extreme that the Grand Jury was hissing is all "immaterial", i.e., he decided that such a biased and prejudiced Grand Jury was a valid Grand Jury proceeding (Appendix p. 23).

He is the only Court who has ever so ruled. All other cases are to the contrary.

REASONS FOR GRANTING WRIT.

The two Defendants in these cases were clearly deprived of their Constitutionally guaranteed right to a fair and unprejudiced investigation by the Grand Jury and as the Fifth Amendment mandates they shall not be held to answer. In fact, without a valid and proper Grand Jury proceeding "*no person shall be held to answer*". *Amendment V to the Constitution.*

In *U. S. v. Wells, et al.*, 163 Fed. 313, the United States District Court for the District of Idaho dismissed an indictment because of the prejudicial conduct of the United States Attorney before the Grand Jury. In this comprehensive opinion the Court stated on page 323:

> "2. In considering the conduct of the district attorney we are compelled to recur to fundamentals. The provision of the fifth amendment of the Constitution that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury, except,' etc., is a reproduction of Magna Charta, which imposed the same restraint in this language:
>
> > "No man shall be taken (that is) restrained of liberty by petition or suggestion to the king or to his councill, unless it be by indictment or presentment of good and lawfull men, where such deeds be done."

At page 324, et. seq., the Court continued:

> "The rights of the defendants are to be measured by the grand jury system as it existed and was understood at the time of its adoption. At the common law the prosecutor had no right to attend the sessions. It is even doubtful whether he had a right, unsolicited, to send indictments to the inquisitorial body for consid-

eration. *Edwards on the Grand Jury*, pp. 110, 111, 113. It is a familiar historial fact that the system was devised to prevent harassments growing out of the malicious, unfounded or vexatious accusations. That it serves the purpose of allowing prosecutions to be initiated by the people themselves in no way detracts from the fact that it still stands as a safeguard against arbitrary or oppressive action; and so it has often been authoritatively declared. In his dissenting opinion in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232 (the majority opinion in no way conflicts upon this point), Mr. Justice Harlan commended this from Story's Constitution:

"The following from Wilson's Works was also quoted with approval:

"'* * * Among all the plans and establishments which have been devised for securing the wise and uniform execution of the criminal laws, the institution of grand juries holds the most distinguished place. This institution, is, at least in the present times, the peculiar boast of the common law. The era of its commencement, and the particulars attending its gradual progress and improvement, are concealed behind a thick veil of [illegible] remote antiquity. But one thing concerning it is certain. In the annals of the world there is not found another institution so well adapted for avoiding all the inconveniences and abuses, which would otherwise arise from malice, from rigor, from negligence, or from partiality in the prosecution of crimes.'"

"It was at the time of the settlement of this country, an informing and accusing tribunal, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject it often stood as a barrier against persecution

in his name, until at length it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government.

"Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as the means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity. * * * Into every quarter of the globe in which the Anglo-Saxon race have formed settlements, they have carried with them this time-honored institution, ever regarding it with the deepest veneration, and connecting its perpetuity with that of civil liberty."

"This learned judge observed that the grand jury was to be regarded as standing against 'oppressions of power, the virulence of malice, and the intemperance of prejudice.' Here the grand jury was duly qualified and impaneled, and it remains to inquire whether the occurrences already related were of such a nature as to infringe the constitutional rights of the defendants. To this end reference must be had to the decisions."

"The district attorney should not give advice or express his opinion as to the sufficiency of the evidence. In re District Attorney of the United States, Fed. Cas. No. 3,925 (vol. 7, p. 745); Ex parte Crittendon, Fed. Cas. No. 3,393a (vol. 6, p. 822); Commonwealth v. Frey (Quart. Sess.) 11 Pa. Co. Ct. R. 523; Edwards on the Grand Jury, p. 127. He cannot advise upon the law.

United States v. Kilpatrick, (D. C.) 16 Fed. 766. He has no right to be present during the deliberations of the grand jury. Charge to Grand Jury, Fed. Cas. No. 18,255 (vol. 39, p. 992) 2 Sawy. 667. State v. Adam, 40 La. Ann. 745, 5 South. 31; Commonwealth v. Bradney et al., 126 Pa. 199, 17 Atl. 600; Rothschild v. State, 7 Tex. App. 519; Edwards on The Grand Jury, p. 128. The great justice, in his charge to the grand jury, supra, said:

> "The district attorney has the right to be present at the taking of testimony before you, for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you; but he has no right to be present pending your deliberations on the evidence.
>
> "It is proper in this connection to keep in mind the fact, already noticed, that the only valid basis on which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecution and the accused; and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality. * * * And in any view the presence of counsel for the prosecution, public or private, during the deliberations of the jury, should be ground for quashing the bill, unless it appear that there was no interference by such counsel in any degree with the freedom of such deliberations. The purpose of the institution of grand juries was, as we have seen, to interpose a check upon the sovereign; and they would cease to answer this purpose, and would increase the danger they were intended to avert, if they should be put under the official direction of the prosecuting authorities of the state."

"But he cannot participate in the deliberations, or express opinions on questions of fact or as to the weight and sufficiency of evidence, or attempt in any

way to influence the finding. To this proposition cases are cited from Alabama, Arkansas, Illinois, Indiana, Louisiana, Pennsylvania, and South Carolina."

"The following may be deduced as the general rule applicable to federal grand juries:"

". . . it does follow that, where the prosecutor not only expresses his opinion, but urges the finding of an indictment, and it is clearly shown that the grand jury must necessarily have been influenced, whether consciously or unconsciously, prejudice will be presumed. Where the conduct is overpowering in its nature, where it inheres in the investigation, where it permeates everything, where it overshadows, as it did in this case, coming from a prosecutor of such profound ability, it is perfectly apparent that it was prejudicial."

> "He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party could only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument."

"Where is the differentiation to begin and end? How shall the distinction be made without at once substituting an opinion here and assuming the functions of the grand jury? If this indictment can be sustained upon these admitted facts, then any citizen, upon the assurances of a prosecuting officer, or upon a partisan argument, may be held to answer without having had the benefit of an investigation by that impartial tribunal which the Constitution has established;"

"The Department of Justice has ever stood for constitutional rights, and if in the performance of its legitimate functions it intrusted to the officer appointed

for that purpose the presentment of persons who in its judgment had violated the law, it had a right to assume that the ordinary methods of procedure would be followed; and if that officer for the time overstepped the bounds, while it must be denominated as unfortunate, it cannot be upheld. It was proper, of course, for the department, which had no other hand in the matter, to direct that this or any other charge be presented to a grand jury, and in doing so to name the persons against whom accusation should be made; but it was improper that this should have been communicated to the jury. Nor can it be said that this statement, standing alone, would necessarily be prejudicial; but upon the proofs here it is manifest that to sustain this indictment would be to establish a precedent to which political partisanship, religious intolerance, or anti-religious intolerance—for the latter is quite as apt to exist as the former—could point as a justification for upholding the return of an indictment through popular demand, public excitement, persecution, or personal ill will. We will do well to adhere to old landmarks and established principles, which are quite sufficient for bringing to trial all who are guilty of an infraction of the laws of the land. If it be competent to do that which it is admitted the prosecutor did in this case, then the grand jury system has ceased to stand for that for which it anciently stood, and for which it was adopted in this country. The Supreme Court has said that it is better that a prisoner should escape altogether than that a judgment of conviction for an infamous crime should be sustained where the record does not show that there was a valid trial. Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097."

"Upon the whole record it appears that a commendable zeal, which gathered force as it progressed, finally expanded into an exaggerated partisanship wholly inconsistent with the semijudicial duties of a

public prosecutor, and entirely unnecessary in the execution of the powers reposed, and particularly in this case, where there could have been no necessity in bringing real offenders to justice. The language of the Supreme Court in Ex parte Wilson, 114 U. S. 426, 5 Sup. Ct. 939, 29 L. Ed. 89, is important:

> "But the Constitution protecting every one from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to procure, or competent to defeat the constitutional safeguard."

"That the prosecutor at the conclusion of his address told them in effect that they were the judges of the matter did not withdraw from them the influence and effect of his remarks, nor restore that unbiased equipose which, from the time of the institution of the grand jury system, has been one of its principal features. Whether the defendants should in fact be brought to trial is not the question. It is whether they should be brought to trial in the manner provided by law, and whether their substantial rights have been invaded. There is no surer road to anarchy than for the courts to assume legislative power by stretching statutory enactments and importing into them penalties not fixed by law, or to extend procedure to such an extent as to invade constitutional rights. The power is with the people to declare all rights and to supply all remedies, and the tribunals created for enforcing the law and the officers appointed to aid in that regard should act strictly within their delegated powers. If a grand jury not properly organized as such, for instance, with less than the number required by the statute, should present even a guilty man for trial, his rights would be invaded, and it would not for a moment be contended that such a proceeding, as against a

timely plea, could have validity; and the Supreme Court has cited numerous instances which would render proceedings altogether void."

In *U. S. v. Rintelen*, 235 Fed., 787, the United States District Court for the Southern District of New York stated:

> "I think the true rule is that he may question the witnesses, advise as to the law, and explain the relation of the testimony to the law of the case. In doing this, he may review the evidence. He must refrain from the slightest coercion of the grand jury and take every pains to have a fair inquest."

In *U. S. v. Huston*, 28 Fed. 2d, 451, the United States District Court for the Northern District of Ohio clearly stated:

> "The district attorney's power to 'conduct the evidence' is not limited to mere interrogations, but involved is the right, if called upon, to advise how the facts elicited meet the applicable law, provided that he does so judicially. This is a privilege which we have frequently presented in instructions to our own grand juries. Its exercise demands restraint and tact; to go further, to press for a bill or to exhibit partisanship against the subject of inquiry will gravely affect the stability of the result."

In *U. S. v. Farrington*, 5 Fed. 343, the District Court for the Northern District of New York, stated:

> "It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offence unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the government

to require, before the trial of an accused person a fair preliminary investigation of the charges against him."

24 *Am. Jr. Grand Jury*, 861 Section 40 states:

"Officers authorized to be present during the proceedings of the grand jury should refrain from attempting to influence its action. Accordingly, the prosecuting officer should make no attempt to influence the action of the grand jury or to give effect to the evidence adduced."

12 *Ruling Case Law* sets forth the following rule for the conduct of prosecuting attorneys before the Grand Jury:

12 *R. C. L.* at page 1040:

"Furthermore, all public officers or other persons authorized by law to be present during the proceedings of the grand jury should refrain from attempting to influence its action. Thus, the general opinion is that the prosecuting officer may, and that it is his duty as well as his privilege to, attend on the grand jurors with matters on which they are to pass, aid in the examinations of witnesses, and give such general instructions as they may require; but he should make no attempt to influence their action or give effect to the evidence adduced."

11 *Cyclopedia of Federal Procedure*, Third Edition, page 308, sets forth the following rule of conduct for prosecuting attorneys before the Grand Jury:

"However, his powers and duties are not unlimited. He must refrain from the slightest coercion of the jury and take every precaution to have a fair inquest."

An extremely able judge has emphasized in a recent decision in Pennsylvania that every man is "entitled to a just, impartial, and unbiased judgment of a grand jury,"

and when the Prosecuting Attorney moves the Grand Jury by bias, passion and prejudice the Grand Jury judgment is a nullity. *Commonwealth v. Bane, et al.*, 39 Pennsylvania District and County Reports, 664, 674. Judge Carr rendered his judgment in the above case when he wrote his summarizing paragraph in the following words:

> "While if is the duty of the Commonwealth's counsel, as well as his privilege, to attend upon the grand jury with matters upon which they are to pass, to aid in the examination of witnesses, and to give such general instructions as they may require, any attempt on his part to influence their action or to give effect to the evidence adduced is grossly improper and impertinent: Commonwealth v. Bradney et al., 126 Pa. 199. Every man, whatever the offenses of which he may be suspected, is as much entitled to the just, impartial, and unbiased judgment of a grand jury as he is to that of a petit jury on his final trial. It is as essential that the one body as the other should be permitted to act free from sway or control from any source, and without fear or favor. The temptation to disregard these safeguards of the rights of persons accused is often great, though, happily, the instances are few where it has been yielded to; but this is one of them of a character so flagrant and shocking that no American Court could tolerate it, and it is our duty to say so with emphasis: Commonwealth v. Smith, 185 Pa. 553."

The *Bane* case above illustrates what a courageous court does when a prosecuting attorney improperly manipulates the Grand Jury by passion and prejudice. He nullified the Grand Jury indictments, in Judge Carr's language "quashed and dismissed" them. Certainly, when the bias and the passion and the prejudice of the Grand Jurors boil over into hissing at the Defendants' chief bookkeeper and long time business associate there is no impartial, unbiased judgment.

Clearly the Defendants' Constitutional Rights have been flagrantly violated in the case at Bar and the Constitutional Prohibition contained in the Fifth Amendment that "*no person shall be held to answer*" must prevail. It is no answer to urge "Congressional policy". The Prohibition of the Fifth Amendment must prevail.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Williamsport, Pennsylvania,
Counsel for Petitioners.

APPENDIX I.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 13577 CRIMINAL.

No. 13633 CRIMINAL.

UNITED STATES OF AMERICA

v.

BRONNE A. BRUZGO, JR.,
ROBERT J. BRUZGO.

Appearances:

For the Plaintiff—BERNARD J. BROWN, United States Attorney; CARLON M. O'MALLEY, Assistant United States Attorney, Scranton, Pennsylvania; HARRY A. NAGLE, JR., Assistant United States Attorney, Lewisburg, Pennsylvania;

For the Defendants—BIDELSPACHER & BIDELSPACHER, Bidelspacher Building, Market Street at Edwin, Williamsport, Pennsylvania.

Opinion.

Defendants Bronne A. Bruzgo, Jr., and Robert J. Bruzgo were indicted to Criminal No. 13577 of this Court charging violations of the Internal Revenue Code covering the year 1954 and to Criminal No. 13633 covering the years

1955, 1956 and 1957. The defendants filed similar motions to dismiss the Indictment in each of these proceedings. The first reason assigned is:

> "1. The Indictment must be dismissed because it was procured by having two Government Witnesses, Internal Revenue Special Agent John L. Katoski and Internal Revenue Agent Thomas M. Hart before the Grand Jury at the same time contrary to Common Law and contrary to Statute and contrary to Rule 6D of the Federal Rules of Criminal Procedure."

In connection therewith a motion (previously denied) has been renewed seeking permission to take the affidavit of each Grand Juror in this case.

The sole basis is the affidavit, subsequently developed more fully in a deposition directed by the Court to be taken, of counsel representing a witness who had been subpoenaed to appear before the Grand Jury at 10:00 o'clock A. M. on January 19, 1961. This witness was the first one called as far as counsel (hereafter referred to as deponent) who had been standing in the corridor, knew. This witness was not called until between 10:20 and 10:30 A. M. Deponent states that at about 10:00 A. M. he saw two Revenue Agents come out of the Grand Jury room together. The following excerpts from the deposition are illuminating:

> "Q. Now, at the time they came out of the room, Mr. Eisenbeis, if you know whether the Grand Jury was in session?
>
> "A. I do not know that the Grand Jury was in session. * * *
>
> * * * * *
>
> "Q. Do you know whether or not prior to the time that Robert Bruzgo was called, whether the Grand Jury was in session?
>
> "A. I do not know whether the Grand Jury was in session. * * *
>
> * * * * *

"Q. Do you know how many Grand Jurors were present in the room at the time these two men came out?

"A. I do not; no.

* * *

"Q. Do you know whether or not there were any Government Attorneys in the Grand Jury Room at the time these Agents allegedly came out?

"A. I do not know.

"Q. Mr. Eisenbeis, the door of the Grand Jury Room, was it open?

"A. I could not see that from the position that I was in.

"Q. Do you know whether or not either Agent Katoski or Agent Hart offered any testimony before the Grand Jury on January 19th, 1961, prior to Robert Bruzgo's being called before them?

"A. I do not know that.

"Q. Were you able to see in the Grand Jury Room?

"A. I was unable to see in the Grand Jury Room.

* * *

"Q. Mr. Eisenbeis, on January 19th, 1961, at about 10:00 o'clock, do you know whether or not a stenographer was in the Grand Jury Room at that time?

"A. I do not know whether there was a stenographer present.

"Q. Mr. Eisenbeis, are you prepared and are you now stating that Special Agent John L. Katoski and Internal Revenue Agent Thomas M. Hart were before the Grand Jury on January 19th, 1961, at a time when the Grand Jury was in session considering evidence in the cases of the United States of America versus Bronne A. Bruzgo, Jr., and Robert J. Bruzgo?

"A. I have no knowledge as to whether the Grand Jury was in session or whether they gave any evidence or testimony before that Grand Jury."

In United States v. Melekh, D. C. N. D. Ill., 193 F. Supp. 586, 596 (1961), the Court said:

> "The cases are legion which hold that the disclosure of grand jury minutes is discretionary with the trial court; that a strong and positive showing is required of persons seeking to break the seal of secrecy surrounding grand jury proceedings. United States v. Brennan, D. C. Minn. 1955, 134 F. Supp. 42; United States v. Alper, 2 Cir., 1946, 156 F. 2d 222; United States v. Schack, D. C. S. D. N. Y. 1958, 165 F. Supp. 371; United States v. Procter & Gamble Co. et al., 1958, 356 U. S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077; United States v. Socony-Vacuum Oil Co., 1940, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; United States v. Rose, 3 Cir., 1954, 215 F. 2d 617; In Matter of April 1956 Term Grand Jury, 7 Cir., 1956, 239 F. 2d 263; Goodman v. United States, 9 Cir., 1939, 108 F. 2d 516, 127 A. L. R. 265; United States v. Skurla, D. C. W. D. Pa. 1954, 126 F. Supp. 711; United States v. Central Supply Ass'n, D. C. N. D. Ohio 1940, 34 F. Supp. 241; United States v. Smyth, D. C. N. D. Cal. 1952, 104 F. Supp 283."

Certainly no less is required with reference to permission to "take the affidavit of each Grand Juror in this case."

Here there is no strong and positive showing, in fact, no showing at all. It is clearly nothing more than a fishing expedition, Blumenfield v. United States, 8 Cir., 284 F. 2d 46, 50 (1960). In balancing the "two policies, the one requiring secrecy, the other disclosure", no problem is presented in the instant case. Application of State of California, D. C. E. D. Pa., 195 F. Supp. 37, 41 (1961).

The second reason assigned is that "The Indictment must be dismissed because it was procured by threatening

a witness before this Grand Jury, Miss Florence Williams". This witness was called before the Court on March 10, 1961, on the issue whether she should be adjudged in contempt. The testimony before the Grand Jury on March 9, 1961, was read by the court reporter and counsel for defendants furnished with a copy. The same counsel also represented Miss Williams at the March 10, 1961 hearing. The Court, at this hearing, stated: "She has no right to shield others through the self-incrimination privilege by asserting it. What she has a right to do, however, is to protect herself, and if she feels that it will tend to incriminate her of a Federal crime, she has a right—and this Court will protect her in asserting that right—not to testify." She was allowed to return to the Grand Jury proceedings, did invoke the privilege and refused to testify. Whether the alleged remarks were or were not made to her is immaterial. She claimed her privilege and did not testify against the defendants. Certainly the defendants can find no basis for complaint in this situation. It was to their advantage that this witness furnished no information to the Grand Jury. The Grand Jury records covering this witness, for March 8, 9 and 10, 1961, have been examined by the Court in camera and I find nothing to justify any other conclusion."

The third and fourth reasons assigned are:

> "3. The Indictment must be dismissed because it fails to set forth the material facts necessary to inform the Defendants with reasonable certainty of the nature and cause of the accusations against them so as to enable them to prepare their defense.
>
> "4. The Indictment does not state facts sufficient to constitute an offense against the United States."

These call for no extended discussion. The various counts of the two Indictments have been examined. They sufficiently state the essential elements and are substan-

tially in the language of the statute alleged to have been violated, United States v. Carpenter, D. C. N. D. Ga., 175 F. Supp. 362 (1959); United States v. Rosenblum, 7 Cir., 176 F. 2d 321 (1949); Rose v. United States, 10 Cir., 128 F. 2d 622, 624 (1942).

Order will be entered denying defendants' motion to renew the motion for permission to take the affidavit of each Grand Juror in these cases and to renew the motion for permission to inspect the record of the March 8, 9, and 10, 1961 Grand Jury proceedings in these cases and the defendants' motion to dismiss the Indictment to Criminal No. 13577 and to Criminal No. 13633.

January 8, 1963

/s/ FREDERICK V. FOLLMER,
United States District Judge.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 13577 CRIMINAL

UNITED STATES OF AMERICA

v.

BRONNE A. BRUZGO, JR.,
ROBERT J. BRUZGO

Order.

Now, January 8, 1963, for reasons stated in Opinion this day filed, It is Ordered and Decreed that defendants' motion to renew the motion for permission to take the affidavit of each Grand Juror in this case and to renew the motion for permission to inspect the record of the March 8, 9, and 10, 1961 Grand Jury proceedings in this case and defendants' motion to dismiss the Indictment, be and same are hereby denied.

/s/ FREDERICK V. FOLLMER,
United States District Judge.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 13633 CRIMINAL

UNITED STATES OF AMERICA

v.

BRONXE A. BRUZGO, JR.,
ROBERT J. BRUZGO

Order.

Now, January 8, 1963, for reasons stated in Opinion this day filed, It is Ordered and Decreed that defendants' motion to renew the motion for permission to take the affidavit of each Grand Juror in this case and to renew the motion for permission to inspect the record of the March 8, 9, and 10, 1961 Grand Jury proceedings in this case and defendants' motion to dismiss the Indictment, be and same are hereby denied.

/s/ FREDERICK V. FOLLMER,
United States District Judge.

APPENDIX II.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,349

UNITED STATES OF AMERICA,

v.

BRONXE A. BRUZGO, JR.,
ROBERT J. BRUZGO,

Appellants.

(D. C. #13577 Criminal)

Present: HASTIE, GANEY, and SMITH, *Circuit Judges.*

Upon consideration of the motion by appellee to dismiss the appeal in the above entitled case, and of the memoranda in support of and in opposition to the motion, and after full hearing, and it appearing that the order sought to be reviewed is not a final reviewable order,

It is ORDERED that the appeal in the above entitled case be and it hereby is dismissed for want of jurisdiction.

By THE COURT,

WILLIAM H. HASTIE,
Circuit Judge.

March 20, 1963

APPENDIX III.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,350

UNITED STATES OF AMERICA

v.

BRONNE A. BRUZGO, JR.,
ROBERT J. BRUZGO,

Appellants.

(D. C. #13633 Criminal)

Present: HASTIE, GANEY, and SMITH, *Circuit Judges.*

Upon consideration of the motion by appellee to dismiss the appeal in the above entitled case, and of the memoranda in support of and in opposition to the motion, and after full hearing, and it appearing that the order sought to be reviewed is not a final reviewable order,

It is ORDERED that the appeal in the above entitled case be and it hereby is dismissed for want of jurisdiction.

By THE COURT,

WILLIAM H. HASTIE,
Circuit Judge.

March 20, 1963

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FILED
MAY 15 1963
JOHN F. DAVIS, CLERK

No. 1082

In the Supreme Court of the United States

October Term, 1962

[redacted]

[redacted]

UNITED STATES OF AMERICA

[redacted]

MOTION FOR A STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

[redacted]

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]

[redacted]
Solicitor General,

[redacted]
Assistant Attorney General,

[redacted]
[redacted]

Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1028

BRONNE A. BRUZGO, JR., and ROBERT J. BRUZGO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 19-24) is not reported. The court of appeals wrote no opinion.

JURISDICTION

The orders of the court of appeals, dismissing the appeals for want of jurisdiction, were entered on March 20, 1963 (Pet. 27, 28). The petition for a

writ of certiorari was filed on April 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly dismissed, for lack of jurisdiction, petitioners' appeals from orders denying motions to dismiss an indictment.

STATEMENT

Petitioners were indicted in the Middle District of Pennsylvania for wilful attempts to evade tax by filing false and fraudulent corporate and individual income tax returns. On October 18, 1961, they entered pleas of not guilty, and on November 17, 1961, they filed motions to dismiss the indictment, alleging that it was improperly obtained because two witnesses were before the grand jury at the same time, and because the prosecutors threatened and disparaged a witness in the presence of the grand jury.

After affidavits were filed by the petitioners and the government, after a deposition was taken by order of the court, and after the court examined *in camera* the record of proceedings before the grand jury, the court on January 8, 1963, denied the motions to dismiss, and denied petitioners' related motions to inspect the grand jury minutes and to take the affidavit of each grand juror (Pet. 19-26). Petitioners appealed, and on March 20, 1963, the court of appeals dismissed the appeal of each petitioner on the ground that it lacked jurisdiction, the orders

appealed from not being final reviewable orders (Pet. 27-28).

ARGUMENT

In dismissing petitioners' appeals for lack of jurisdiction, the court below was clearly correct, since an order of a district court denying a motion to dismiss an indictment is not a "final decision" within the meaning of 28 U.S.C. 1291, and is therefore not appealable. See *Atlantic Fishermen's Union* v. *United States*, 197 F. 2d 519, 520 (C.A. 1); *United States* v. *Golden*, 239 F. 2d 877, 878 (C.A. 2); *United States* v. *Foster*, 278 F. 2d 567 (C.A. 2), certiorari denied, 364 U.S. 834; *United States* v. *Tiplitz*, 202 F. 2d 60 (C.A. 3); *Cheretos* v. *United States*, 256 F. 2d 576 (C.A. 6); *Kyle* v. *United States*, 211 F. 2d 912, 914 (C.A. 9). "Final judgment in a criminal case means sentence." *Berman* v. *United States*, 302 U.S. 211, 212. Cf. *Di Bella* v. *United States*, 369 U.S. 121, 126; *Cobbledick* v. *United States*, 309 U.S. 323, 324-325.

Petitioners imply that, if this interlocutory appeal is not allowed, their constitutional rights will be violated, because the Fifth Amendment provides that "No person shall be held to answer * * * unless on a presentment or indictment of a Grand Jury," and yet here, as they contend, there was no proper grand jury proceeding (Pet. 8, 18). But such contentions are not regarded as sufficient justification for piecemeal appeals, when the right in question may, if violated, be vindicated by appeal from the final judg-

ment in the case, *Heike* v. *United States*, 217 U.S. 423, 431-433; *DiBella* v. *United States*, *supra*; *Parr* v. *United States*, 351 U.S. 513, 518. Indeed, the law applicable to this case is so well settled that it may appropriately be said here, as the First Circuit observed in the *Atlantic Fishermen's Union* case, *supra*, 197 F. 2d at 520: "The order of the district court denying the motion to dismiss the indictment was obviously not a 'final decision' * * * and the attempted appeal therefrom was, we think, obviously frivolous."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. DRANT,
Attorneys.

MAY 1963.